



Manhattan

Citation

Cass R. Sunstein, Manhattan, 55 Fed. Comm. L.J. 585 (2003).

Published Version

<http://www.repository.law.indiana.edu/fclj/vol55/iss3/26/>

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:12918284>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

5-1-2003

Manhattan

Cass R. Sunstein
University of Chicago

Follow this and additional works at: <http://www.repository.law.indiana.edu/fclj>

 Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), and the [Communications Law Commons](#)

Recommended Citation

Sunstein, Cass R. (2003) "Manhattan," *Federal Communications Law Journal*: Vol. 55: Iss. 3, Article 26.
Available at: <http://www.repository.law.indiana.edu/fclj/vol55/iss3/26>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Federal Communications Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

Manhattan

Cass R. Sunstein*

WHAT'S THE PROBLEM?

There is a remarkable difference between television in 1961, when Newton Minow delivered his great “Vast Wasteland” speech,¹ and television in the current era. The difference is the increase in the number of channels. When Minow spoke, most Americans only had access to three or four stations. The big networks monopolized the system. In the modern era, most Americans have cable television, and this means that most Americans have access to about 100 or more stations. Indeed, many Americans have access to DIRECTV, which means that they have access to more than 500 stations. No one knows what innovations the future will bring, but it is clear that scarcity is a decreasing problem. Let us suppose, plausibly, that for the overwhelming majority of Americans, television will contain an extraordinarily wide range of options in the near future.

Certainly it is still possible to describe the fare of particular broadcasters and stations, on particular days, as a kind of wasteland. But it would not be possible to describe television in this way. In the modern era, television is much less like a wasteland and much more like Manhattan, in the sense that it contains an astonishingly wide range of options, suitable for many tastes. Those who want to see the news can watch the news all day, and on more than one channel (and C-SPAN is hardly a wasteland). Those who want to learn about history can watch The History Channel (not a wasteland in the least). Those interested in animals can watch Animal Planet (very far from a wasteland). Nor are children left out: the Disney

* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago.

1. Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (May 9, 1961).

Channel offers high-quality fare for children; so too does Nickelodeon. For consumers and citizens, what would seem to matter is the overall package and option set, not the offerings of a particular broadcaster. Does the idea of a "vast wasteland" have relevance today?

Consider an analogy: magazines. Many magazines are extremely low quality. They offer their readers little or nothing. Taken by themselves, they are not-so-vast wastelands. But the world of magazines is exceptionally diverse, with large differences in topics, points of view, seriousness, and quality. The world of television is not entirely different. Channel 71 might be akin to *People*, or occasionally even *The National Enquirer*, but channel 44 might be like *National Geographic*. Is this a problem? Or consider the more recent analogy of Internet Web sites. Many Web sites are a wasteland or worse; but the Internet is no wasteland. Television does not offer anything like the range of possibilities afforded by the Internet. But in its current incarnation, it is far closer to the Internet than was its 1961 version. Would it not seem odd for a regulator to complain that certain Web sites are wastelands *if* the overall package contains numerous options and if many of them are good?

We can go further. The idea of analogies itself might be misleading. The experiences of most people are not determined by any particular technology. Few people learn, or find entertainment, from only one source. Most people do not restrict themselves to magazines, or television, or the Internet, or, for that matter, radio, movies, DVDs, books, or newspapers. They tend to learn from, and to enjoy, some kind of mixture of all of these. And if they emphasize one of the available possibilities, it is because that is what they prefer. It might have been possible to express concern about the content of television in an era of three or four stations and a far more limited set of communications options. But in the modern era, people are free to choose among countless possibilities.

In these circumstances, it might be sensible to ask: What's the problem? If television viewers end up seeing a wasteland, it is because that is what they have chosen to see. In a free society, they are entitled to do exactly that. Of course the interests of children, much emphasized by Minow, cannot be entirely promoted by reference to choice. But parental choices surely matter, and good programming can certainly, and increasingly, be found for children as well. In short: Minow's concerns were relevant in 1961, simply because the options on television were so limited, but today's world is entirely different. Do his concerns have continuing relevance? Do any concerns have relevance, or should we see

the communications market as mostly well-functioning and free from any need for substantive controls, or even moral suasion on those who provide programming? Why not leave the market alone?

FRAGMENTATION

I am not certain how to answer these questions.² But there are several problems with the emerging situation. The first involves fragmentation—not a problem for Minow in 1961, but for obvious reasons a problem for us.

To see this point, imagine that in a technological future, each person could devise, with great precision, her own preferred communications “menu”; imagine, in other words, that programming could be fully and not just partially individuated. In such a system, people could filter in exactly what they want, and filter out exactly what they do not want. Instead of having channels 4, 5, and 7, or even 2 through 90, people would be able to specify, on demand, exactly the programming that they wanted. If they sought to include only news, and indeed only news dealing with the Middle East, they would be able to do exactly that. If they wanted to see situation comedies, or for that matter situation comedies dealing with the romantic lives of people in their thirties, that would be feasible as well. If they wanted to encounter congenial political perspectives, and only congenial political perspectives, that would be possible too.

On the grounds favored by neoclassical economics, this would seem to be a striking advance, a victory for both freedom and welfare. But it also contains serious risks, above all because it may well result in a situation in which many or most are not exposed to diverse topics and views, but instead hear louder and louder echoes of their own preexisting convictions.³ Like Minow, we should evaluate the system of communications in democratic terms, and not simply from the standpoint of neoclassical economics. And from the democratic point of view, one of the advantages of a well-functioning system of communications is that it supplies one or more genuinely public spheres. In those spheres, diverse points of view are presented and confront one another, and are offered to people who have a willingness to learn. And in those spheres, people cannot monitor, in advance and with precision, the topics to which they are exposed. In a way, the inability to monitor is irritating; but it is also a gain, simply because it ensures that citizens will be able to see a range of topics and perspectives.

2. Some discussion can be found in CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); CASS SUNSTEIN, *REPUBLIC.COM* (2001).

3. See SUNSTEIN, *REPUBLIC.COM*, *supra* note 2, for a detailed discussion.

Compare this to the situation in which Minow spoke in 1961, when general-interest broadcasters, newspapers, and magazines dominated the scene. An advantage of the daily newspaper, *Time*, *Newsweek*, and *ABC World News Tonight* is that typically they provide people with many subjects and points of view. For a democracy, it is important to make provisions for multiple forums of this kind. Of course I do not mean to suggest that scarcity is better than numerous options. A system with multiple channels, not to mention countless Web sites, offers countless advantages. What I am suggesting is that if a large number of options produces a great deal of fragmentation, real problems might arise, if only because people will be living, in a sense, in “gated communities”⁴ in which they do not encounter their fellow citizens.

If, for example, liberals are mostly hearing from liberals, and conservatives mostly from conservatives, democratic deliberation will be harder to undertake. Such deliberation requires an ability to have some sympathetic understanding of the views of those with whom one disagrees, and such an understanding cannot come from a system of gated communications communities. Of course Manhattan has many extraordinary virtues; but fragmentation is a problem with Manhattan, both in its current form and as a model for communications.

Social science has underlined this point.⁵ It shows that when like-minded people speak only or mostly with one another, they tend to go to extremes. More specifically, group polarization means that “members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies.”⁶ Thus, for example, those who think that global warming is a serious problem are likely, after group discussions, to think that global warming is an extremely serious problem. Those who reject affirmative action are likely, after talking with one another, to reject affirmative action with great vehemence. Those who tend to support gun control are likely to do so with heightened enthusiasm after talking together. By itself, these movements toward a more extreme position may or may not be a problem. The difficulty arises when a fragmented system of communications ensures that many people will live in a set of “gated communities.”

4. This term refers to communities that are not geographically gated, but gated in the sense that the people within speak, and listen, mostly to like-minded others.

5. See SUNSTEIN, REPUBLIC.COM, *supra* note 2, for an outline.

6. CASS R. SUNSTEIN, THE LAW OF GROUP POLARIZATION 3-4 (Univ. of Chi. Law Sch., John M. Olin Law & Economics Working Paper No. 91, 1999), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=199668.

It is not inevitable that a wide range of options will be seen as a problem here. Everything depends on what people actually choose. When perspectives and topics are easy to find, people easily can get access to opinions that diverge from their own. Fragmentation need not result. If people seek out new topics and views, society may see convergence rather than fragmentation. The problem will arise only if many people use the fact of great variety as a reason to limit their own horizons, at least as compared to a situation in which general-interest broadcasters provide an array of opinions and subjects. I believe that we have reason to think that many people are indeed using diverse options in this way and in many domains. Notice that the word is “many,” not “most.” My only suggestion is that a system of diverse options creates risks of its own; and that fragmentation is among those risks.

I have noted that this was not Minow’s focus in his “Vast Wasteland” speech, and for understandable reasons. But part of Minow’s emphasis was on democracy; and if we emphasize democratic goals, we will be concerned with fragmentation as well.

DEMOCRACY AND ASPIRATIONS

But these points about fragmentation do not go to the core of Minow’s concerns. Minow seems to be urging, most generally, that television is not best understood as an ordinary commodity, entirely subject to the forces of supply and demand. He seems to think that those who run important communications outlets should have aspirations that go beyond people’s consumption choices. He seems to be concerned with the cultural effects of television, and to think that even if broadcasters are catering to people’s tastes, they might not be serving the public interest. Hence there is a difference between the public interest and what interests the public. I believe that on these counts, Minow was, and is, entirely right.

The American political tradition is committed to the ideal of deliberative democracy,⁷ an ideal that has animated much First Amendment doctrine and media regulation. If so, a system of communications might not be ideal even if it provides exactly what consumers want. The question remains whether democracy is served by that system. Even if the problem of scarcity is conquered, and even if the media market is well functioning from the economic point of view, it remains important to ask whether it promotes a well-functioning system of democratic deliberation. This is so especially in view of the importance of television to people’s judgments

7. See generally JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994).

about what issues are important and about what it is reasonable to think.⁸ If television is to promote democracy, rather than the other way around, we need to ask whether it is covering serious questions in a serious way, and appealing to people's best and most substantive sides. Consider, by way of general orientation, John Dewey's suggestion:

[W]hat is more significant is that counting of heads compels prior recourse to methods of discussion, consultation and persuasion, while the essence of appeal to force is to cut short resort to such methods. Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . The important consideration is that opportunity be given that idea to spread and to become the possession of the multitude. . . . The essential need, in other words, is the improvement of the methods and conditions⁹ of debate, discussion and persuasion. That is *the* problem of the public.

The most important point is that a well-functioning market system may fail to provide a system of communication that is well-adapted to a democratic social order. Americans are entirely aware of this fact, whatever they may choose in their capacity as viewers and listeners. Hence they may, and sometimes do, seek collective corrections, in the form of financial subsidies and regulations that might make the situation better rather than worse.

In this sense, there is a pervasive difference between what people want in their capacity as viewers (or "consumers of television") and what they want in their capacity as citizens, in which their aspirations sometimes move to the fore. Minow was appealing, above all, to people's role as citizens. And a democratic public, engaged in deliberation about the world of telecommunications, may legitimately seek a system embodying aspirations that diverge from their consumption choices. When participants in a democracy attempt to make things better, and do not simply track their consumption choices, it is not helpful to disparage their efforts as "paternalism" or as "meddling." Their efforts at reform represent democracy in action. It is hardly inappropriate for government to respond to people's aspirations and commitments as expressed in the public realm.

In any case, it seems clear that the public's "tastes," with respect to television programming, do not come from nature or from the sky. They are partly a product of current and recent practices by broadcasters and other programmers. What people want, in short, is partly a product of what they are accustomed to seeing. Tastes are formed, not just served, by

8. See generally SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* (1987); SHANTO IYENGAR, *IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES PUBLIC ISSUES* 127-43 (1991).

9. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 207-08 (1927).

broadcasters. In an era in which broadcasters are providing a good deal of public interest programming, dealing with serious issues in a serious way, many members of the public will cultivate a taste for that kind of programming. This effect would promote democratic ideals by disseminating information and helping to increase deliberation.¹⁰ In an era in which broadcasters are carrying sensationalistic or violent material, members of the public may well cultivate a taste for more of the same. “Free marketeers have little to cheer about if all they can claim is that the market is efficient at filling desires that the market itself creates. . . . Just as culture affects preferences, so also do markets influence culture.”¹¹ If this is so, the economic ideal of “consumer sovereignty” is placed under some pressure; market activities cannot easily be justified by reference to tastes that they themselves generate.

I do not suggest that any particular reforms or regulations are justified by these ideas. I urge only that democratic aspirations are a legitimate basis for evaluating television and any other system of communications. The point is fortified by the fact that such systems help form the various preferences and values to which they cater. If this is so, it continues to make sense to challenge those who provide television programming, in order to urge that they do more and better for the viewing public. Taken as a whole, television is hardly a wasteland. But much of it could be far better. Too frequently, news coverage emphasizes sensationalistic charges, depicts candidates in the crudest terms, and fails to engage substantive issues at all.

Increasingly impoverished political debate is yet another cost of our current cultural trajectory. Complex modern societies generate complex economic and social problems, and the task of choosing the best course is difficult under the best of circumstances. And yet, as in-depth analysis and commentary give way to sound bites in which rival journalists and politicians mercilessly ravage one another, we become an increasingly ill-informed and ill-tempered electorate.¹²

Too often, programming consists of ludicrous situation comedies or unimaginative “action” shows. Television, of course, is for relaxation and entertainment as much as for anything else. But even when it is designed for these purposes, it can be much better, as the best programming shows.

CONCLUSION

I have emphasized the largest difference between television in 1961 and television in the modern era: the astonishing increase in the range of

10. For evidence that the effects of television on this count are far from fanciful, see IYENGAR, *supra* note 8, at 26-116.

11. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 201 (1995).

12. *Id.* at 203.

options. This difference raises many questions about the continuing relevance of Minow's speech. Television is hardly a vast wasteland; it is more like Manhattan. And even if there is too much wasteland on television, the world of communications includes countless possibilities. Many magazines are by themselves wastelands, but few would argue for a "Federal Magazine Commission," entrusted with the job of improving the world of magazines as a whole. Many Web sites are worse than wastelands, and some of them should be regulated; but there is no sufficient basis for a "Federal Web Site Commission" with the mission of overseeing Web sites on some kind of continuing basis.

Despite these points, Minow's speech does seem to me to survive the test of time, above all because of his emphasis on democratic goals and his rejection of the idea that television should be evaluated in the terms used for ordinary markets. I have mentioned the risk of fragmentation—not a problem when Minow spoke, but a genuine risk today. And Minow's largest plea was for a conception of television that would cater to people's highest aspirations, not to their short-term preferences. By stressing those aspirations, and the cultural consequences of programming, Minow was able to urge that the public interest is different from what interests the public. When large cities, like Manhattan, work well, it is not only because they cater to the private interests of individual consumers; it is also because they engage in a large set of civic enterprises that appeal to, and draw on, the deepest commitments of their citizens. In the modern era, the same is true of individual broadcasters and of television itself.